PERSONAL LIBERTY

AND

Martial Law.

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A Review

OF

SOME PAMPHLETS OF THE DAY.

PHILADELPHIA:
April, 1862.

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Dear Montgomery,—I think it much to your honor that you were the first in Philadelphia to take the field in defence of Habeas Corpus, against the extraordinary constitutional assaults that have been made upon it. Many have since drawn their swords in its defence, but I have seen no blade more polished or more effective than your own. I have extended my remarks to the subject of martial law. You and I agreed in thinking that our distinguished fellow townsman, whom Lord John Russel truly spoke of in the House of Lords, as the head of the bar in America, and who he said had argued his case "with much ingenuity;" had made as great a mistake in assuming that the rightful suspension of the writ of Habeas Corpus in America deprived the citizen of all other constitutional guaranties of freedom, as he had in arguing, that the right to suspend the privilege of the writ belonged to the Executive. The subject is, perhaps, already burdened with better criticism than mine, but in these days of our country's calamity, when the despotic hand is abroad and the liberty of the press as well as the writ of Habeas Corpus is suspended; it may not be unbecoming in an humble citizen to give token of the faith that is in him.

Believe me,

Very truly,

Your Friend,

Edward Ingersoll.

John T. Montgomery, Esquire.

PERSONAL LIBERTY AND MARTIAL LAW.

CIVIL WAR and Revolution start strange topics of discussion. If any one, whether lawyer or layman, but an intelligent, not yet impassioned man, having an idea constitutional or legal, or who had ever given a thought to the American Government, had been told so lately as the year 1860, that at this day we would be discussing the question of the rightful power of the President of the United States to arrest and imprison its citizens at his discretion, what would such auditor have said? Would any earthly information have convinced him that such futurity was close at hand? Yet here we have it upon us, in such shape that it cannot be denied; and when the Attorney-General of the United States, Professor Joel Parker at Cambridge, Mr. Reverdy Johnson at Washington, and Mr. Horace Binney at Philadelphia, have written pamphlets to demonstrate that such is the American constitutional law, and above all, we know that the exercise of this power is the now American fact, it seems vain any longer to say it is impossible, and turn from its consideration.

We venture the proposition that governmental madness has never yet accomplished anything in this world. We mean by no means to disparage the element or the idea of popular or individual violence or madness. It is a great idea, of infinite worth and power. When Mr. Stanton, in his proclamation in which he attacked "infidel" France, appealed to this mighty passion of fanaticism, he showed that he understood its value, as Joshua whom he refers to, did, and as all great men have. But he showed too, that though he is a distinguished lawyer, he misunderstood his case politically. The Northern side in this great sectional civil strife in which our unhappy country is embarked, has, we must not forget, possession of the government; possession of the governmental idea. This is what is now called "the Union." It is so far the great element

of the Northern strength. It is the head, the heart, the life of the Northern cause. We can no more afford to forget it, or for a moment to lay it aside, because it is for that moment an incumbrance, or does not advance the purpose immediately in hand, than can a marching army leave behind their General, because he must be carried in a coach, being from an attack of gout, unable to sit his horse. This governmental idea which is the great Northern General, the element of their strength, is we submit, incompatible with madness, fanaticism, revolution. All we agree great ideas, great things to accomplish certain designs, but not the design we have in hand. This spirit has, upon many great occasions, been appealed to with transcendant success; the most famous of all in late days having been that of "infidel" France herself, when by its means, she succeeded in hurling back the armies of Europe which were leagued for her subjection. But no instance can be given in history of its use for governmental purposes. It has overthrown governments but has never upheld them. The latter is our side of the game, and it has enormous advantages, as we have already seen; but it has not all the advantages. This revolutionary power, whatever it may be worth, belongs to revolution. It is a weapon the federal Government cannot use. The popular delight at what is called strong government, which we have seen exhibited in this matter; the idea being that the more violence, and illegal violence, government exhibits the more does it exhibit its earnest passion and the more likely is it to succeed, is in our political situation a profound mistake. If, in a physical encounter, the opponents are equally unskilled, passion is no doubt a great element of success; but government is like pugilistic science, and when one of the parties has that advantage added to his power, he must not only not forget himself in passion, but his skill enables him to take advantage of the passion of his opponent, which he turns to weakness.

The administration is responsible to the people for the peaceful government of the whole country, and to that accountability they will undoubtedly be held. He is the worst enemy, not only to his country, but to the administration, who, in this time of peril, doubts, or suggests to them a doubt, of the wisdom of standing by that Constitution which they have received and sworn to uphold. The ship of state is in a storm, this is not the time to question her staunchness or to suggest alterations in her build. As is said to have been said, by high executive authority upon occasion of a late popular effort to remove from office a secretary of one of the departments, "it is no time for swapping horses when we are swimming the river." Our American horse may be a bad one, a proportion of our people has always disparaged him, and desired a change. If he, however, can-

not now save us, we are surely lost. Our only chance of safety is now in him. Who is so disloyal to the government as he who at this time doubts its practicability; who either from pride of opinion, lust of power, or more ignoble fear, desires that the American guides and landmarks should be set aside, and some others taken in their stead; who questions the integrity or soundness of the great maxims of American free government. Conservatism is our only chance of safety. Conservatism of our own American institutions; such as our forefathers gave, such as our people have lived under and understand. Liberty of speech, liberty of the press, liberty of the person. All wrong perhaps, but the only guides that we know, the only lights that our people recognize, the only landmarks that they understand. They are as essential to the safe conduct of the government in this hour of peril, as they are to the happiness of the people; and it is as great administrative madness in the emergency, to attempt to throw them aside, as it is indicative of popular madness, to be willing to relinquish them. A free press like a free person is of American nature, the inferiority or superiority of which great men have differed about. Bonaparte was strongly of one mind upon the subject, Mr. Jefferson of the other. Good or bad, they are American; our people and government understand them, and they understand no other. A free press would have been our protection against a repetition of such diplomatic blunders as our secretaries committed in the case of "unique" Austria and "infidel" France; not so good a protection no doubt as a good censorship of the press, but still a protection. The only possible chance for the federal government in this our day of calamity, is, as it ought to be, to stand by our American principles.

This subject of the governmental control over personal liberty has been discussed in the pamphlets above referred to, in two points of view: *First*, as a power derivable to the executive from the Constitution itself, in what we may call the Habeas Corpus clause. *Second*, as a military incident to the executive power, the President being, by the Constitution, the head of the military power of the government. This latter view of the matter, although excluded by Mr. Binney from his consideration of the subject, is in fact comprehended in it. Although he argues only the power of suspending the Habeas Corpus, he infers and takes for granted that this exclusion from discharge from arrest, carries with it also the right to arrest and imprison, as well as to hold. This goes to show, as is, we submit, the truth, that the question involved, is after all, divide it as you will and point it as you please, the great question of personal liberty as opposed to governmental restraint of that liberty for its own purposes whatever they may be.

The clause in question, which appears in the ninth section of the first article of the Constitution, is in these words: "The privilege of the writ of Habeas Corpus shall not be suspended unless, when in cases of rebellion or invasion, the public safety may require it."

The Federal Constitution of 1787 has, during more than seventy years, been the subject of very extended and elaborate consideration. This more or less in all and every part of it. Many books have been written in elucidation and explanation of its every clause and section. This particular Habeas Corpus clause has been over and again at the hands of judges, legislators and text writers, a frequent subject of thought and comment. It came up broadly for the consideration of the nation and its legislators, in the year 1807, when the question of action under its provisions was practically before the public. Thus during the seventy years of the existence of this fundamental law of our Government, this particular subject has been before a free, talking, writing, thinking people, and has been, as history shows, during that time freely and much discussed, written and talked about. It was always, and by everybody, considered a matter of vast and vital importance; perhaps of vaster and more vital importance than any one other matter of our fundamental law. During this long period of time, and this frequent handling of the matter, there has been no whisper of difference of opinion or views upon this point.* All have been agreed that the power to suspend the privilege of the writ of Habeas Corpus was a legislative power. It has been so asserted and assumed by authors, legislators and judges, and upon occasions innumerable. No dissent has ever been given, no doubt has ever been expressed. This popular right, as claimed, was supposed to have a great historical root. It had not been created by Americans in 1787; but had always, in their books of history, been claimed by them as of great ancestral foundation and descent.

In this condition of the subject, which we have stated very briefly, and which would well bear a fuller statement, for it is important to every argument fully to understand the condition and position of the subject-matter at the time when the question for discussion was first suggested, this constitutional point, as it is claimed to be, was first taken. In 1861 this American right was violated, as would have been said be-

* Mr. Lieber, to whom Mr. Binney dedicates his pamphlet, and whose work, on civil liberty and self-government, is spoken of as containing "some striking and impressive remarks upon the mere negation of power to government," says, at p. 131, vol. 1, "We have seen already under what circumstances our Constitution permits the suspension of the Habeas Corpus, and that this cannot be done by the President alone, but by Congress only, need hardly be mentioned."

fore that day, or as the writers above named tell us, it was enquired into and found to have no foundation,—in fact that there was no such existence. It was found that the proper exercise of the constitutional provision for the suspension of the privilege of the writ of Habeas Corpus, was the exercise of an executive not of a legislative power.

To support the affirmative of this proposition required, beside the usual positive argument, an abnegation of the past, and closing of the book of history, which was extremely difficult. It required belief, that the men who had just carried America through a bloody political struggle of more than seven years' duration, a struggle for political liberty, had laid aside their dear bought experience of humanity and of government, and attempted something new, something utopian, something not analogous to the past, but which yet those best practised of all political philosophers dreamed would live in the future. It was not only necessary to furnish the new eyes for our observation of the clause, but to close the old ones. This, the exclusion of what is called the English analogy, was plainly the most difficult part of the author's task. It well might prove so to any legal mind. The right so to exclude historical authority in this question of personal liberty; the truth of the averment that "the language of the Habeas Corpus clause in the Constitution was new, and is peculiar," (p. 7,) which is the foundation of the whole argument, has been so completely taken from beneath the author's feet, that it would be now both presumptuous and unnecessary to attempt here, again, what has been already so thoroughly done.* It has been shown, that the words of the clause instead of being new, as is claimed for them, and purposed to express some new and unprecedented idea; are individually and in the precise collocation in which we have them in the Constitution, to be found in precedents innumerable, in English and American history,—both judicial and legislative. Our title to this, our precious inheritance of English analogy, in this question of popular liberty, having been thus written in the skies, Mr. Binney's pamphlet is answered; for he himself concedes, that unless this English analogy can be excluded, what he calls the legal argument is conclusive against his view.† Still the subject is of such vast importance, and the "ingenuity"

* On this point of the history of the words of the clause, we may refer especially to a learned and much labored pamphlet by James F. Johnston, Esquire, of Philadelphia, entitled "The Suspending Power and the writ of Habeas Corpus."

† The value of pedigree in showing title to liberty, seems to be differently esteemed by Sir Dudley Diggs. We quote from his address to the Lords, as one of a Committee of the Commons, on occasion of a conference during the proceedings which led to the Petition of right: "Whilst we, the Commons, out of our good affections, were seeking for money, we found, I cannot say a book of the Law, but

of some of the arguments of this pamphlet is so thorough, that we will be pardoned some further discussion of it. Indeed, the view suggested being professedly original and disclaiming the basis of authority, the only way to meet such argument must be by analyzing and examining in detail the logical soundness of the positions that are taken.

Argument without reference to the past is philosophical speculation; as argument it soon becomes impossible; this early compelled the writer to a distinction, which it is submitted is entirely sophistical and unsound, namely, a distinction in speaking of the English Constitution, between what is called the common law and parliamentary practice. No such line can be drawn. By the common law we are told the English subject enjoyed the privilege of the Habeas Corpus in all cases, "the principle allows of no exception or qualification," &c., (p. 13.) The argument then goes on to assert: "The principle, therefore, of the old common law that every freeman is entitled at all times and in all cases to be exempt from discretionary and arbitrary imprisonment, has, in England, come practically to this, that he is entitled to it unless parliament shall, in their discretion, see fit to take it away for a time, by giving the power of such imprisonment to the king in council, or to one of the king's principal secretaries of state, or, perhaps, to any body they see fit." (p. 14.) We are then told that the people of America meant, in framing their Constitution, to take as their analogy this, which is called the common law, and reject what is called parliamentary practice. This distinction we submit to be, as unfounded in legal and English consti-

many, and those fundamental points thereof neglected and broken, which has occasioned our desire of this conference: wherein I am first commanded to show to your Lordships in general, that the laws of *England* are grounded on reason more ancient than books, consisting much in unwritten custom, yet so full of justice and true equity that your most honorable predecessors and ancestors many times propugned them with a *nolumus mutari;* and so ancient, that from the *Saxon* days, notwithstanding the injuries and ruins of time, they have continued in most parts the same, as may appear in old remaining monuments of the Laws of *Ethelbert*, the first Christian King of *Kent*, *Ina* the King of the *West-Saxons*, *Offa* of the *Mercians*, and of Alfred the Great Monarch, who united the *Saxon Heptarchy*, whose laws are yet to be seen, published, as some think, by Parliament, as he says to that end, *Ut qui sub uno rege, sub una lege regerentur.* And though the book of *Litchfield*, speaking of the troublesome times of the *Danes*, says, that then *jus sopitum erat in regno, leges et consuetudines sopitæ sunt* and *prava voluntas, vis et violentia magis regnabant quam judicia vel justitia;* Yet by the blessing of God, a good king *Edward*, commonly called St. Edward, did awaken those laws, and as the old words are *Excitatas reparavit, reparatas decoravit, decoratas confirmavit.* Which *confirmavit* shows, that good king *Edward* did not give those Laws, which *William* the Conqueror, and all his successors since that time have sworn unto."

tutional theory, as it is in historical fact. That which is disparagingly spoken of, as "the pleasure of parliament," was always part of the English Constitution. No exceptional clause of modern introduction, but expressed and comprehended in the great Charter quoted for this common law distinction, by the words "per *legem terræ*." There never was a time in English constitutional history when this power of suspending the writ did not exist. It always, with them, resided somewhere. No historical question can be made on that point. The controversy always was, where does it reside; with the parliament or with the crown? "The formal contest for the possession of this discretion to imprison and detain without trial," marked the change in the English Government from monarchy to aristocracy, and thence to democracy, as this power over the "*lex terræ*" has resided in one or other of these departments of government, from the conquest to this time.

Again, this power which under the American Constitution is inferentially in the legislature, from the nature of free institutions, and by analogy to the English Constitution, is granted by no clause in the fundamental law. In order to get it to the Executive, it was necessary to show an express grant. This, which is vital to the argument, is assumed by what is called supplying an ellipsis—sophistically so assumed, for the clause in the Constitution is not an enabling but a disabling clause: not a grant of power, but a restraint of power. Mr. Duponceau speaks of this clause (View, p. 44,) as one of the articles in the Constitution, "in the nature of a Bill of Rights, and the object of which is to secure the liberty of the citizen;" not a grant of power to any department of the Government. Mr. Hamilton so speaks of it in No. 84 of the Federalist, and quotes, in that connection, the famous passage from 1 Blackstone, 136, to show that the protection of the person is more essential to liberty than the protection of life or property. Mr. Pinckney, introducing the subject to the attention of the Convention on the 28th August, when the clause was adopted, did so "arguing the propriety of securing the benefit of the Habeas Corpus in the most ample manner." He was securing a right, not granting a power. Professor Parker himself contends, that the Habeas Corpus clause in the Constitution, is no grant of power to any body, and takes Merryman's case sharply to task on this point. He says: "Starting as Mr. Chief Justice Taney did, with the grave error in his premises of supposing a restraint upon a power to be a grant of it, it is not surprising that he did not reach any right conclusion on the subject. It would have been wonderful had he done so." This assumption of a grant of power, which is essential to Mr. Binney's argument, will be found to run through the whole of it.

The clause in question, in its history in the Convention, first appears in Mr. Pinckney's plan. Mr. Binney, quoting it from there, remarks: "The different subjects of this paragraph have no common relation between them, except that they are all restrictive." (p. 24.) This alone, we reply, sufficiently connects them; and would apply them to the legislature. There is in the American Constitution, no restriction applied to any other than the legislative power, either State or Federal. There was no other power to restrict. The legislative power is, so to speak, a natural power; it is the representative of the popular power; an existence before the Constitution, which its framers were moulding. The executive power had no such existence; it is a creation of the Constitution. In the American idea of Government, there is no prerogative of the executive. He has nothing but what is given him. We find him restricted in nothing.* A restriction would have been in contradiction of the theory of this creation. Not so the legislative power; it had from analogy to all free governments, a very different nature and foundation for its existence. In democratic government it is the foundation of every thing—all honor and power. It represents all power as in a monarchy does the monarch; and restrictions are upon it in a constitutional democracy, as in a constitutional monarchy they are upon the king. We accordingly, in the Federal Constitution, find restrictions upon no other than this popular power; not surely because other powers are unrestricted, but that there were none others existing than this.

To escape from analogical explanation or historical reference for the true meaning of the words used; to show that "the language of the Habeas Corpus clause in the Constitution was new and is peculiar," the history of the clause, as appearing in the debates in the Convention that framed the Federal Constitution, is gone into by our author. The clause finally passed into our Federal Constitution, almost in the very words in which it was originally proposed by Mr. Pinckney, in the

* Mr. Binney tells us, in speaking (p. 33) of the clauses of Sec. 9, Art. 1 of the Constitution, that "one of them restrains the executive department." This, it is suggested, is a mistake. The clause referred to probably, is in these words: "No money shall be drawn from the treasury but in consequence of appropriations made by law." This can hardly be considered such an article by any one who has ever read Mr. Binney's great speech to show legislative control over the treasury as distinguished from executive control, when the author of the decision in Merryman's case removed the deposits from the Bank of the United States. The other clause, "No person holding any office of profit or trust under them (the United States) shall, without the consent of Congress, accept of any present," &c., can hardly be the clause referred to.

plan of a Constitution which he submitted. He having most plainly built upon English parliamentary analogy, and proposed the clause as a restriction upon supposed or apprehended legislative power; not at all as a grant of power, as it is necessary to the argument to view it; Mr. Pinckney stands directly in the way, and must be got rid of. He was also unfortunate enough, on the 20th August, in reviving his idea to use the words "suspended by the Legislature," in speaking of the restriction upon the privilege of Habeas Corpus. This collocation of the words instead of putting "the Legislature," in the beginning of the paragraph, as he had done on the 29th May, closes the door for argument as to his meaning, and Mr. Binney agrees it "to be free from doubt, notwithstanding the obliquity of the language and the imperfect grammatical structure of the sentence." But Mr. Pinckney is unfortunate, on the 20th August, in putting to flight another of the author's theories; for he uses the phrase, "the privileges and *benefits* of the writ of Habeas Corpus shall be enjoyed," &c. Thus explaining the meaning of the word *privilege* which he was using; and showing that his mind was entirely unconscious of the value of the term as we have now learned it, and unaware that, by the use of this word privilege, not "of the common law, nor of Blackstone its commentator, nor of parliamentary law," he was imperilling the liberties of his country. Again, on this fatal 20th August, Mr. Pinckney substituted for the words "except in case of rebellion or invasion," the words "except upon the most urgent and pressing occasions." This explanation of his former phrase again damages the argument, viz: that the phrase as it now stands in the Federal Constitution, "unless when in cases of rebellion or invasion, the public safety may require it" is a grant of power, of executive power, no authority to authorize; giving a power to be exercised in a condition of things, about which there can be no dispute; struck out as it were at one heat; not for dull legislative discussion, but ascertained and definite. Mr. Pinckney's equivalent phrase "most urgent and pressing occasions," well illustrates the "requirements of the public safety." Mr. Pinckney has fallen into the English analogy, past hope of recovery. He has "indicated a disposition to throw away that striking and important qualification of the privilege which had been expressed in his plan of a Federal Constitution, and to substitute for it the discretion of the Legislature *on the most urgent and pressing occasions*, the omnipotent discretion of parliament, and it would have brought the Constitution in this respect into perfect identity with the Constitution of England with a *maximum* limitation of time, instead of the pleasure of parliament." (p. 27.) Mr. Pinckney has failed to make the discovery, that suspending the privi-

lege, as distinguished from, suspending the benefit, or the right, or the writ, when the public safety may require it, transferred the control over this great subject of personal liberty from the people's representatives to the Executive. He has fallen into the English analogy. He spoke three times upon the subject, and it was difficult to move more than once, without showing this English cloven foot. He clearly did not understand the idea; as to the expression we are told, "whether Mr. Pinckney was the first to express this limitation of the right of personal liberty is not material. He would be more entitled to credit for first introducing it with his plan of a Federal Constitution, if he had not subsequently appeared willing to throw it away." (p. 26.) Mr. Pinckney has said too much, he plainly had not this great idea in his mind; and strange as it may appear, Mr. Madison who next comes before us, is rebuked for not having said enough. This rather unkindly, for Mr. Madison, in only reporting the proceedings, unlike Mr. Pinckney, stood in the way of nobody's argument or view of the question. Our author rather goes out of his way to tell us that Mr. Madison has given "but a brief and meagre statement," and that "none can read his work with attention, without surmising that on some occasions much more was said than is recorded, and that this probably was one of them." In support of this idea, there is quoted from the report of debate, "Mr. Rutledge was for declaring the Habeas Corpus inviolate. He did not conceive that a suspension could ever be necessary at the same time in all the States." The author then comments, "This cannot have been all that Mr. Rutledge said. The conclusion of his remark is in apparent contradiction to the beginning, which expressed his opinion that the Habeas Corpus should be declared inviolable. The latter part seems to regard suspension of the writ or act as the object, and as being either local or general, and not as personal. It was a clear mistake.* The whole remark is however obscure, and there may be some reason to doubt whether the reporter's mind or the delegate's, embraced the technical doctrine upon the subject." Mr. Rutledge, it must be remembered, was in a deliberative assembly, giving his views which others might in part or in whole agree with or dissent from. He was not striking out an executive phrase, to be as definite and certain in its limits, as the requirements of the public safety. In these two sentences he gave his views; expressing perhaps his first and second choice in the matter. In

* Mr. Reverdy Johnson has written an article on this subject, where he takes the ground that the suspension of the Habeas Corpus, under the clause in the Constitution, must be always local or general, not personal.

the latter, no doubt, he fell like Mr. Pinckney into the English analogy. In that point of view, "It was a clear mistake." That neither the reporter's mind nor the delegate's embraced the technical doctrine upon the subject, (unless indeed by "the technical doctrine" be meant this executive idea of the power as opposed to the legislative,) is a questionable doubt to raise against such names as Madison and Rutledge, particularly when we bear it in mind that our author has left the merely legal and artificial view of the subject which he agrees to be against him, and is now discussing the constitutional and natural view. After his consideration of the history of the matter, to be found in the debates of the Convention which framed the Constitution, the author comes to the conclusion that enough is there recorded to show that the idea which he is endeavouring to enforce as the true one, viz: of a great distinction between, suspension of the privilege, and suspension of the act, or writ, must have been in the minds of the delegates. We can only ask in the minds of which of the delegates, and what has shown it? Is this proving the point, or as the author says of Judge Story, "demanding or extorting it."

Again, as the first object of a free people is the preservation of their liberty; and liberty is only to be preserved by maintaining constitutional restraints and just divisions of political power; in no instrument, more than the Federal Constitution, would verbal location be a fair guide, in solving a question of power as belonging to one or other of the departments of government. It is with the most careful precision divided into seven articles. The first treating of the Legislative; the second of the Executive; the third of the Judiciary; the fourth of the inter State relations, new States and territories and protection of the States of the Union; the fifth, providing the form of amending the Constitution; the sixth, providing certain sanctions and results not coming properly under any of the preceding heads; the seventh, stipulating that upon ratification by nine States, the Constitution shall go into effect. The division of the powers of government into legislative, executive, and judicial, is here not only expressly recognized, but as far as language could succinctly do so, these departments are carefully and precisely separated. This was considered a matter of cardinal importance to the liberty of the country. It so appears by the debates in the convention on the 17th and 19th of July. It so appears by some of the papers in the Federalist, answering the charge that had been made against the Constitution, of confusion of these departments of power; and where Mr. Madison contends that they had been separated as much as it was possible to do. This anxious division of powers was a favorite American doctrine. It

so appears, as in many other places, in the Maryland Declaration of Rights in 1776, art. 6. In the teeth of all this, we are told that "no instrument permits the interpretation of its clauses to be affected by position less than the Constitution of the United States." (p. 34.) And again, "The present position of the clause in the Constitution is not of the least importance;" and the history of the formation of this clause in the Constitution, is offered to show that its position in the legislative division of that instrument, gives it no title to be considered as belonging to the legislative, rather than the executive department of the government.

It appears that when the clause was finally adopted, the convention had under debate the judiciary article. The introduction of the subject by Mr. Pinckney at that time, upon examination of page 484 of Mr. Madison's debates, appears the most natural thing possible. The clause securing trial by jury had just been disposed of. The cognate subject of Habeas Corpus most naturally suggested itself. Mr. Pinckney introduced the topic; and the final shape was given by motion of Mr. Gouverneur Morris. Thus adopted in the convention, it was by the committee on style and arrangement transferred to the legislative article. Of this committee Mr. Morris was a member. Mr. Binney says, "Whatever was his (Mr. Morris's) intention, the place assigned by him to the amendment did as it were expressly negative the bearing of Mr. Pinckney's motion upon the Legislature." Can anything be more forced than this conclusion, of a matter which looks perfectly natural and simple upon its face, and entirely otherwise. How could Mr. Pinckney's legislative idea be negatived by what was done, when he himself introduced the topic; the convention having at the time under consideration the judiciary article; and how can Mr. Morris be said to have assigned this place to the amendment, which it temporarily occupied, when he did not introduce the topic. Yet we are told, (p. 33,) on such a basis of argument as this that the "position (of the clause in question) in the ninth section of the first article of the Constitution, is not only of no avail, but the argument from position is more than countervailed by expression; and is emphatically overcome by the journal of the Convention." This subject of Habeas Corpus was as closely cognate to the judicial as to the popular power; but does showing, that it might have been or was in the article regulating either or both of these departments, bring it at all nearer akin to the Executive.

The author comes out of his historical enquiries into the formation of the clause, worse than he went into them. He has not succeeded in showing his ideas of the matter to have been in the mind of any one of

the makers; he has shown their ideas to have been inconsistent with his; and the English analogy has frequently obtruded itself on him. He does not think so, and we are told that "the word *legislature*, which was contained in Mr. Pinckney's plan of a Federal Constitution, and probably also in his motion when the subject was finally disposed of, was thus cast aside and an entirely new form and new limitations were given to the principle." If the former part of this proposition has been proved, the latter is undoubtedly true. More different limitations could not possibly be conceived; they are as wide apart as Turkey from America, and as discordant as the principles of their respective governments.

Again, an argument is drawn from analogy to the pardoning power; from that power being placed, by the Federal Constitution, in executive hands. It is a curious fact, but going to show that it is the old question that we are discussing, that when this subject of Habeas Corpus and the question of the control of the crown over it, was under debate in the English commons house, in 1628, the Attorney-General, in arguing the case for the crown, used among others precisely this same argument. It was answered by Mr. Glanville, who concludes quaintly: "Therefore the king may safely be trusted with war, coin, denizens and pardons, but not with a power to imprison without expression of cause or limitation of time; as the poet tells us, because *libertas potius auro.*" (7 St. Trials, 184.)

Again we are told, and the point is much labored, in order to the abnegation of our right to the history of English liberties, as leading to the true location of this power, that English liberties were built upon a jealousy of executive power, but that no such jealousy could have existed against the presidential power in the formation of the American Government; and from this idea the argument claims support. We utterly deny the truth or soundness of any such idea. We answer, that that jealousy, the protection of liberty, is rooted in human nature, deeper and wider than English or American freedom. To show our title to it, we turn to the first great charter of American rights, the Declaration of Independence, where every protest and complaint is of executive tyranny and executive usurpation; where the inheritance of English freedom and English law, is not repudiated and disclaimed, as this author would pursuade us was the purpose of our forefathers, in the formation of the Habeas Corpus clause of the Constitution; but English analogy is embraced and clung to as our most valued right and noblest inheritance. We turn to the debates in the Convention, and find Dr. Franklin, and others, expressing the greatest apprehensions of executive power. We quote the beautiful boast of Sir William Blackstone, then in the hands

of every American lawyer and legislator, on this very subject of imprisonment of the person :

"Of great importance to the public is the preservation of this personal liberty; for if once it were left in the power of any, the highest magistrate, to imprison arbitrarily whomever he or his officers thought proper, (as in France is daily practised by the crown,) there would soon be an end to all other rights and immunities. Some have thought that unjust attacks, even upon life or property, at the arbitrary will of the magistrate, are less dangerous to the Commonwealth than such as are made upon the personal liberty of the subject. To bereave a man of life, or by violence to confiscate his estate, without accusation or trial would be so gross and notorious an act of despotism as must at once convey the alarm of tyranny throughout the whole kingdom; but confinement of the person by secretly hurrying him to gaol, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government.* And yet, sometimes, when the state is in real danger, even this may be a necessary measure. But the happiness of our Constitution is, that it is not left to the executive power to determine when the danger of the State is so great as to render this measure expedient; for it is the parliament only, or legislative power, that, whenever it sees proper, can authorize the crown, by suspending the *habeas corpus* act for a short and limited time, to imprison suspected persons without giving any reason for so doing."

* The wisdom and truth of this remark, the people of America are at this moment in a political condition to realize. Who of their fellow citizens out of the circle of their immediate relatives and personal friends, now knows whether the Maryland legislators and police commissioners are still in prison or out of it, alive or dead? We have lost sight of them. They have been put, by the hand of power, beyond the reach of law; and yet the act that did it was as violent an infraction of both liberty and law, as ever was committed by Cromwell, Napoleon or his greater uncle. Still we dine and smile and thank God we are free.

Sir Robert Phillips, in 1627, well expressed the idea that this is the most important of all rights: "I can live, (he said) although another without title be put to live with me; nay, I can live although I pay excises and impositions for more than I do; but to have my liberty, which is the soul of my life, taken from me by power, and to be put up in a gaol without remedy by law, and thus to be so adjudged to perish in gaol; O improvident ancestors! O unwise forefathers! to be so curious in providing for the quiet possession of our lands and liberties of parliament, and to neglect our personal bodies and to let them die in prison, and that *durante bene placito*, remediless. If this be law, what do we talk of our liberties?"

We quote on this point the eloquent words of Mr. Webster, at a time when a portion of our citizens, of whom the learned author of the pamphlet under discussion was one, were indignant and incensed, and thought the public safety vastly imperilled by what they considered American executive usurpation:

"The contest for ages has been to rescue liberty from the grasp of executive power. Whoever has engaged in her sacred cause, from the days of the downfall of those great aristocracies which had stood between the king and the people, to the time of our own independence, has struggled for the accomplishment of that single object. On the long list of the champions of human freedom there is not one name dimmed by the reproach of advocating the extension of executive authority; on the contrary, the uniform and steady purpose of all such champions has been to limit and restrain it. Popular and representative right has kept up its warfare against prerogative, with various success; sometimes writing the history of a whole age in blood, sometimes witnessing the martyrdom of Sidneys and Russels, often baffled and repulsed, but still gaining on the whole, and holding what it gained with a grasp which nothing but the complete extinction of its own being could compel it to relinquish. At length the great conquest over executive power in the leading western States of Europe, has been accomplished. The feudal system, like other stupendous fabrics of past ages, is known only by the rubbish which it has left behind it. Crowned heads have been compelled to submit to the restraints of law; and the people, with that intelligence and that spirit which make their voice resistless, have been able to say to prerogative, 'Thus far shalt thou come, and no farther.' I need hardly say, sir, that into the full enjoyment of all which Europe has reached only through such slow and painful steps, we sprang at once by the declaration of independence, and by the establishment of free representative Governments; Governments borrowing more or less from the models of other free states, but strengthened, secured, improved in their symmetry and deepened in their foundation, by those great men of our own country whose names will be as familiar to future times as if they were written on the arch of the sky. Through all this history of the contest for liberty, executive power has been regarded as a lion that must be caged. So far from being the object of enlightened popular trust, so far from being considered the natural protector of popular right, it has been dreaded, uniformly, always dreaded, as the great source of its danger."

Again, we are told that suspension of the privilege of the writ of Habeas Corpus is rightfully under our Constitution within the control

of the Executive, not of the popular department of the government because the requirements of the public safety in case of rebellion or invasion is matter of Executive, rather than of Legislative cognizance. "The power to imprison and to deny or delay a discharge from an im- "prisonment, is an executive power. All the conditions of the exercise of "the power described in the Habeas Corpus clause are of executive cog- "nizance, that is to say rebellion or invasion, and the requirement of the "public safety in the time of either. No legislative act is necessary or pro- "per to give the cognizance of these facts to the executive department." (p. 7.) And again, "The direction of such a war (an internal war) is neces- "sarily with the executive. The office cannot be deprived of it." (p. 8.)

These are strange sounding phrases to an American ear. Is this the American Constitution? Is this phrase "when the public safety may require it" the expression of a definite and certain condition of facts about which no two men can differ, as the author labors to persuade us; or is it, wide and general, indefinite, unbounded, conferring as unlimited a discretion as words could be framed to convey? "The requirements of the public safety!" who can possibly judge of them but the supreme power, and where does that reside in a popular government? We are told that this is an executive clause, conferring therefore an executive power. Is not, in this sense, all power executive that requires execution? The executive is the arm of power; but the question is, who moves that arm? Is not the power of making war executive; yet who declares war under our Constitution? Is not, in this sense, the power of taxation executive? The law must be enforced; the tax must be collected.

The political principles set forth upon the latter pages of the pamphlet, if placed as an introduction to the argument, would have paved the way to its intelligibility, and made it less marvellous, that the reputation of a great legal name should be cast into such a breach. *Cui bono* we ask? We have not yet seen the legal argument to show that the Constitution *ex visceribus* authorizes the Executive head of the nation to suppress newspapers. We have the fact, and we may have the argument. It would not be more astonishing to the American people than what has already appeared. Why strain the constitutional cloth upon occasion when no possible effort of that sort can make it cover the breach that it is required to conceal.

The quotations from De Tocqueville, that one of the inherent dangers of republican constitutions arises from the dependence of the Executive upon the Legislative department, and Mr. De Tocqueville's illustrating this fact from the American Constitution, seem strangely introduced in support of an argument, to show that this dictatorial power is conferred

upon our Executive. As a political view in a convention framing a Constitution, it is well put: how here, where the argument is not what ought to be, but what is, our form of government. It is strange to set forth what "according to the opinion of eminent men and lovers of freedom is the vice of the Constitution," (p. 56,) viz: weakness of the executive department, as a conclusion to an argument made to show that it has no such weakness but the most dictatorial strength. The minds of these eminent men and lovers of freedom, like some others that have been passed upon, did not embrace our "technical doctrine on the subject." "It was a clear mistake" on their part.

Great American names have been treated cavalierly throughout the argument; when that of Mr. Jefferson turns up, the greatest American apostle of this dreadful and dreaded democracy, the mask of argument is almost thrown aside. We are given to understand that the precedent made by Mr. Jefferson, of suggestion to Congress to suspend the Habeas Corpus, was not from honest belief that such was the proper exercise of the power under the Constitution of the government he was administering; but "that he might safely exercise it under their wing." We are told, "There was nothing like either (rebellion or invasion) in the land. Happily, there was virtue enough in the House of Representatives, or enough of alienation from Mr. Jefferson," (an equivalent for virtue?) "to make the House reject the bill by an immense majority." It does not appear from his message to the Senate, that Mr. Jefferson suggested the suspension of the writ of Habeas Corpus. As to the statement of 1861, that there was neither rebellion nor invasion then in the land, Mr. Jefferson may have pretended it; but by turning to the debate in the House of Representatives, we find upon that point of fact, that not only the supporters of the bill, but some of those who most strongly opposed it, like Mr. Eppes, agreed that of the existence of rebellion there was no doubt. The point of discussion was principally, not as to the fact of rebellion, but as to the requirements of the public safety.*

* *Mr. Eppes* says, "Of the existence of the rebellion, or combination against the authority of the United States, there can be no doubt, as we have on our table a detailed account of its origin and progress."

Mr. Varnum says, "Will gentlemen deny that there exists in the United States at present a rebellion? I presume not, it is too notorious to admit of doubt."

Mr. Sloan says, "What analogy do these oppositions bear to this rebellion? I consider the late or present conspiracy to be of greater magnitude than any we know of in history."

Mr. Bidwell says, "The first inquiry would naturally turn upon the existence of a rebellion. On that point he had no doubt." .... "An existing rebellion, even of this aggravated description, was not alone sufficient to justify a suspension of

This matter, taken in connection with the contemptuous disclaimer of the fact in the pamphlet of 1861, is very pertinent to our point of the definiteness and certainty, the executive character of the fact of "rebellion;" much more the "requirements of the public safety." When does the fact of "rebellion" begin? If a citizen knocks down a constable armed with a warrant for his arrest, is that "rebellion" against the authority of the laws?

We are told that "in the case of actual rebellion and actual invasion, "the declaration or proclamation of the facts is not legislative but execu- "tive; and so is the decision of what the public safety may require, for that "is a conclusion of fact from other facts within the range of the same exe- "cutive duty." And again, "all experience teaches us that the only safe "depositary of the power of suspending the privilege of the writ of Habeas "Corpus, in time of rebellion, is that feeble executive which the Constitu- "tion has made for us, standing upon the only basis of the Constitution, "with no other support than the integrity and patriotism of the man who "has been elected to it by the people." This, we are told, is the "fundamental rule of personal liberty among freemen in the United States;" that "it is conservative of personal freedom in general." We are well told, that it is "un-English." When such doctrines as these become governmental with us, it is time for Americans to look anxiously to, what the author of the pamphlet calls, the "margin of disobedience;" whose occupants, we are told, have generally the most occasion for the writ of Habeas Corpus. The "margin of disobedience" to such doctrines as these! England's best names have lived, and many of them have laid down their lives upon that margin. The best ancestral blood of the present English secretary of foreign affairs, and that to which he no doubt most proudly points, was spilled upon that margin. Upon the fourth of July, 1776, the men who put their names to our Declaration of Independence, all stood upon that margin; endangering their own freedom no doubt; but, that we of this day, if not utterly unworthy of

the writ of Habeas Corpus. To bring it within constitutional justification, it must be required by the public safety."

Mr. Elliot says, "Is it indeed a case of rebellion? We are officially informed that rebellion has reared its hydra front in the peaceful valleys of the west." . . . "and the executive possessing all this information, assures us that the public safety is not endangered."

Mr. Barwell says, "The President evidently holds out the idea that the correct and proper mode of proceeding can be had under the existing laws of the United States."

Mr. Smilie says, "The President declares that in his opinion there is no danger to be apprehended."

the inheritance they bequeathed us, might live free. This is the great American margin: our most glorious possession and inheritance. God forbid that we should disparage it.—Not the margin of disobedience to the laws, but to executive encroachment upon those laws.

But *Secondly*, we leave the great question of the right to suspend the privilege of the writ of Habeas Corpus, and come to the greater question of what is called Martial Law.

As made to meet the present emergencies, the arguments in hand require more, to reach their conclusions, than any construction of the Habeas Corpus clause in the Constitution can give them.

Had the Federal Constitution said expressly, and in so many words, that the Executive should have the power in his discretion, to suspend the privilege of the writ of Habeas Corpus, such clause standing in conjunction with the other clauses of the Constitution as we have them, would by no means carry, by any legitimate argument, to the conclusions of power, at which the gentlemen, whose pamphlets we are discussing, arrive. Such clause would be entirely insufficient to gratify the present appetite for violence; this thing which is so erroneously considered an evidence of governmental strength. Governmental violence, it is in our emergency, the highest duty, and the exercise of that duty is the highest wisdom, of the prominent and thinking men of the nation to protect us from. Grant the view to be the sound one, that the Presidential power may suspend the Habeas Corpus at will; is it possible that the exercise of such power plunges us into a despotism; abrogates all law; establishes a dictatorship; authorizes what we have seen, men taken from their homes by violence, and carried to distant prisons upon a telegraphic order from a secretary of that Executive; those homes being hundreds of miles from any military force, or the possibility of military collision? Is it possible that under a suspension of the privilege of the writ of Habeas Corpus, never so legitimately made, a newspaper reporter, the most unmilitary of all creatures, but still a citizen, can be, as we are told to-day, seized under military order, without oath or judicial warrant, to be tried by a court martial. Had the executive applied to Congress, as he should have done, under his oath to preserve, protect and defend the Constitution, for power to suspend the privilege of the writ of Habeas Corpus, the power no doubt would have been granted him in a moment. God forbid that we should then have been in America, in the legal or constitutional position in which the insanity of the hour claims to plunge us.

There are guarantees of free government, in the Federal Constitution, beside the restriction upon the power to suspend the writ of Habeas Corpus; not one of them, perhaps, as fundamental and important as the one we have been discussing, but still fundamental and of vast importance. These are stated in our charter in broad terms, in plain English; not exceptionally; introduced by no conjunctions; dependent upon no location or collocation for their full understanding: of which, perhaps, we may know the meaning without analogy or reference to other things; so plain that human ingenuity cannot discuss their meaning. We give some of these American rights:

"The trial of all crimes, except in cases of impeachment, shall be by jury."

"No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law."

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by an oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

"No person shall be deprived of life, liberty or property, without due process of law."

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed."

Now what do our authors do with these? Mr. Binney *assumes* to the Executive the whole judicial power necessary to get the citizen in jail, without one word of argument; he includes the right to arrest in the question of discharge from arrest. Professor Parker and Mr. Reverdy Johnson, put the matter on the military ground, as superseding all civil rights; that these are guaranties not meant for times of war or civil commotion; the holiday suits of freedom, to be laid aside upon a rainy day; not meant to bear the wear and tear of human nature. The roof of our constitutional house is, they say, made of material not fit to resist the weather; but when the storm comes, to be withdrawn and some other cover put over our heads.

The differences among our authors are somewhat curious. While Mr. Binney so anxiously seeks the needed power in the Habeas Corpus clause as the only possible place to find it, Mr. Johnson claims that to be entirely unnecessary, gives up that clause liberally to Congress, and finds elsewhere in the Constitution the needed dictatorship; abundantly

and triumphantly. The Attorney-General, in his argument, derives the required power from the *civil* side of the presidential office, expressly disclaiming, nay, arguing against the *military* idea of it. Professor Parker and Mr. Johnson, on the other hand, not only claim the power as a *military* part of the presidential creation, but expressly disclaim the possibility of its being, under our Constitution, a part of his civil functions. If it is a civil function, they say it must belong to Congress.

Mr. Johnson tells us, "the power which the President has exercised "and intends to maintain, is vested in him as Commander-in-Chief. It "is strictly and exclusively a military power."

The Attorney-General tells us, "He (the President) is a *civil magis-* "*trate*, not a *military chief;* and in this regard we see a striking proof "of the generality of the sentiment prevailing in this country at the "time of the formation of our Government, to the effect that the *military* "ought to be held in strict subordination to the *civil* power."

The Attorney-General, starting with the broadest and fairest disclaimer, that the Federal Government has any powers not expressly given to it, tells us that "they, (the founders of the government,) seem to have been actuated by a special dread of the unity of power, and hence, in framing the Constitution, they preferred to take the risk of leaving some good undone, for lack of power in the agent, rather than arm any governmental officer with such great powers for evil as are implied in the dictatorial charge to 'see that no damage comes to the Commonwealth.'"

With such premises he gains the needed power thus, "all the other officers of Government are required to swear only 'to *support* this Constitution;' while the President to '*preserve, protect and defend*' it, which implies the power to perform what he is required in so solemn a manner to undertake. And then follows the broad and compendious injunction, to 'take care that the laws be faithfully executed.'" &c.

"Would the writer argue, (said Mr. Webster in the Senate on the 7th May, 1834,) that the oath itself is any grant of power; or that because the President is to "preserve, protect and defend the Constitution," he is, therefore, to use what means he pleases, or any means for such preservation, protection and defence, except those which the Constitution and the laws have specifically given him? Such an argument would be preposterous."

In starting to answer the second question proposed to him, the Attorney-General states so accurately his argument upon the first, that we give it in his own words. Two questions had been propounded by the Government to the Law officer: 1st. As to the right of the President to

arrest at his discretion and hold in custody, persons, &c.: 2d. His right to refuse to obey a writ of Habeas Corpus in such cases. The Attorney-General says: "Having assumed in answering the first question, that the President has the legal discretionary power to arrest and imprison persons who are guilty of holding criminal intercourse with men engaged in a great and dangerous insurrection, or persons suspected with 'probable cause' of such criminal complicity, it might seem unnecessary to go into any prolonged argument to prove that in such a case the President is fully justified in refusing to obey a writ of *Habeas Corpus* issued by a court or judge, commanding him to produce the body of his prisoner, and state when he took him, and by what authority and for what cause he detains him in custody—and then yield himself to judgment, 'to do, submit to and receive whatsoever the judge or court awarding the writ shall consider in that behalf.'" This is the substance of the paper, and is capital opinion in one sense, but not in the sense of argument. "*Having assumed,*" as he tells us, the first and transcendent power, the second, he tells us truly, may not be worth talking about. The radical error of the argument seems to be, in his idea that this co-ordinate, independent branch of the Government is not to carry out the laws and thus attain the end of its creation, but that the President is to execute the offices of Government according to his personal ideas of the most direct and proper means to attain the governmental end.

"The mere denomination of a department as one of the three great and commonly acknowledged departments of Government, does not confer on that department any power at all," said Mr. Webster, in commenting on the clause "the executive power shall be vested in a President." Not so, Mr. Johnson, but holding this dictatorial power to be conferred by the clause in the Constitution, "the executive power shall be vested in a President," he tells us, that the restricted nature of the powers of our Federal Government, which he concedes, applies only to the legislative and judiciary departments, but not to the executive!

Again, arguing the power to the Executive, he says, "If the war power of every government may declare martial law, and this no one has yet denied—then it must have the power, as one of the admitted incidents of martial law, to disregard the writ in question." *Quere* the war power in our government?

Professor Parker, assuming boldly the ground of the subjection of the civil to the military power in time of war, and arguing "*ad absurdum*" the impossibility of any other footing of things; says that, excepting one or two cases to the contrary in Massachusetts, which he quotes, there is no such thing known to the books, as Habeas Corpus in time of

war to relieve from war arrest. We answer, if foreign war is meant, that is true; for a prisoner of war can have no Habeas Corpus. If civil war is meant, intestine commotion, which is our matter in hand; the books are not only full of such cases, but political questions on writs of Habeas Corpus have arisen in no other than such times as these. The Habeas Corpus is not only not a holiday suit, but as a political writ it is made for no other than a rainy day. Mr. Parker, having argued his question of the necessity of martial law, assumes the power to the President. We answer with the petition of right; which, if it granted the existence of such power, denied it to the king.

All these gentlemen have strongly in their minds the idea, and it is the broad basis of all their arguments, that the dictatorial power must exist somewhere; that there are emergencies such as we are in, when human nature calls for it and human government to be permanent, must have it. This idea we believe to be un-American, in the fullest sense, and the very antagonistic idea, as the Attorney-General has told us, of that which lies at the root of the Federal government. Do not let us however forget, that to sustain the argument they have advanced, they must go vastly further. They must not satisfy us only, that our Federal government contains this dictatorial power; but that it contains it, the emergency not to be declared as in Rome by the aristocratic or the popular power, not to be declared as in England by the aristocratic and the popular power, but to be declared by the same head that is to enjoy it, by the same hand that is to wield it,—the limits, (the requirements of the public safety in case of rebellion or invasion,) as broad and casing as the general air. The worth of these limits is well stated by the Chief Justice in Merryman's case, where he says, "The introduction of these words is a standing admonition to the legislative body of the danger of suspending it, (the writ,) and of the extreme caution they should exercise before they give the government of the United States such power over the liberty of a citizen." They are this, and nothing more. Not to speak of more policied and difficult governments; when has there been a time that within the extended limits of peaceful America, this discretion might not have been used, foully to rouse rebellion, or fairly to suppress it? Did the anti-rent troubles in New York present such a case? Did the Mormon and the Kansas difficulties present such a case? Does the present refusal in Allegheny county, in Pennsylvania, to pay the interest on certain bonds, make such a case of rebellion; or how long would it take a designing executive hand to give these cases such a presentation?

We have then the broad question; the power of dictator given to the

executive department by the Constitution in emergency; the executive himself to judge of and declare that emergency. Is this American? We have given some of the clauses and guaranties from the Federal Constitution that seem to make it impossible. Is it answer enough to say, that our charter of government did not contemplate the emergencies of government, and was not purposed to meet them? Is it answer to say, that the presidential oath of office implies powers that over-ride these guaranties; that the phrase "the executive power shall be vested in a president" is a phrase *implying* such power, as to overthrow the whole fabric? If these are arguments or sufficient answers, then are our written guaranties of freedom worse than useless; then indeed does our fondly cherished title by descent vanish, and nothing remains for the support of popular rights, but the strong arm of the hour, whatever may be its worth.

That the claimant of governmental power must show title to it, is the basis of English, as well as of American liberty. We have carried this doctrine farther than they have. It has always been the great landmark in American constitutional construction. It is the most prominent idea, in all construction of our written Constitutions; largely applied to the State governments, but most fully, and by its founders most anxiously, to the Federal Constitution. It is expressed in Amendments, Arts. 9 and 10. "The powers not delegated to the United States by the Con-"sitution, nor prohibited by it to the States, are reserved to the States "respectively, or to the people." "The enumeration in the Constitution "of certain rights shall not be construed to deny or disparage others re-"tained by the people."

De Lolme speaks thus of this basis of liberty, in his view of the English government. Contrasting in this respect England with other countries, after saying that in other countries, the executive power of the State is supposed to possess originally and by itself all manner of lawful authority; that every one of its exertions is deemed to be legal, not ceasing to be so until they are stopped by some express and positive regulation, &c., he continues, "In England, the very reverse obtains. It is not the authority of the government, it is the liberty of the subject which is supposed to be unbounded. All the actions of an individual are supposed to be lawful, till that law is pointed at, which makes them to be otherwise. The *onus probandi* is here transferred from the subject to the prince. The subject is not at any time to show the ground of his conduct when the sovereign or magistrate think proper to exert themselves; it is their business to find out and produce the law in their own favor, and the prohibition against the subject." Book 2, chap. 17.

The idea which some of the gentlemen upon whose views of executive power we are commenting, seem rather to resent, that the executive is nothing but the administrator of the law, the servant of the law, the mouthpiece of the law, is as true in England, as it is in America. Unless we reject ancestral history, this battle of freedom has been fought and won. This is a truth, the establishment of which cost Charles the First his head, and spilled the blood of ten thousand better men, though of none so exalted in the government as he. This was the great cause and ground of quarrel during all the bloody and dreadful years which led to the 30th January, 1649. The question, whether the law was superior to the executive, or the executive superior to the law; whether the English House of Commons, the popular representative, was to judge of the requirements of the public safety in cases of rebellion, with which the land was then teeming, or the executive was to be the sole judge. The "*mandatum domini regis*" was determined to be legally the mandate of the executive only as the mouthpiece of the law. The superiority of the law to the executive power was the very fact, the establishment of which established popular government.

The question, whether the executive or the legislative department of the government, is to judge of "the requirements of the public safety in case of rebellion or invasion," amounts in its elements to the question of despotism or free representative government. To show that even in its ancient phraseology, it bears a curious resemblance to the matter we are discussing, we refer to the question of the crown to the judges in the great ship money case of John Hampden, in 1637. That question was in these words, "*When the good and safety of the kingdom in general is concerned, and the whole kingdom is in danger;* whether may not the king, by writ under the great seal of England, command all the subjects of this kingdom at their charge to provide and furnish such number of ships with men, victuals and munition, and for such time as he shall think fit, for the defence and safeguard of the kingdom from such danger and peril, and by law compel the doing thereof in case of refusal or refractoriness? and *whether in such case is not the king sole judge both of the danger, and when and how the same is to be prevented and avoided?*" The first and last lines of this question which we have italicised, are almost our subject in hand.

The subservience of the executive to the legislative power, was the very question in dispute. It came up, in questions of the right to be discharged by Habeas Corpus from arrest. Inasmuch as the writ of Habeas Corpus was then used, not as now, for a judicial enquiry into the guilt or innocence of a party accused, but for an enquiry into the legality of his

arrest, the question made by it, was more precisely our second question than our first, viz: the right to the protection of judicial process for arrest, rather than a right to that process for discharge from arrest. A proper commitment was at that day sufficient to hold for trial. The question was of the legality of the commitment. Was the command of the executive enough, or must it be the command of the law. The "*lex terræ*" was defined by Mr. Selden,* and Mr. Littleton,† in their arguments before the House of Commons to mean "due process of law;" as distinguished from executive will or power. "The very point, scope, and drift of *magna charta*, was to reduce the regal to a legal power, in matter of imprisonment, or else it had not been worthy so much contending for."‡ When the "sovereign executive power" was proposed by the lords as a salvo to the petition of right, the Commons rejected it; Sir Edward Coke saying, "Magna charta is such a fellow that he will have no sovereign;" and Sir Thomas Wentworth, "our laws are not acquainted with sovereign power." (7 State Trials, 199.)

In all these proceedings and revolutionary commotions by which it was established that the executive was nothing but the mouthpiece of the law, the question made against it was of his civil prerogative. The monstrous idea of the hour, that there is a provided military executive power, as distinguished from the legislative, in free government, which supersedes and over-rides all law and the process of law, remained for our discovery. Such an idea cannot be found in the English Constitution or the history of its contests between the legislative and executive power. It was as the head of the judiciary that the king claimed the right to commit. This judicial right was denied him, unless done through the judicial organ. Not that his being the head of the judicial department of government, was denied; but his prerogative so derived must be exercised through a responsible functionary. The process of law gave that responsibility. The very question was then, not of his right to commit; but, of his right to commit other than by process of law. This judicial function, a part of the royal prerogative as the head of all the departments of the government, was not personal to the crown; nor could it be delegated but to a judicial functionary. Thus the king himself had no power to imprison but by due process of law. *Nihil aliud potest rex quam id solum quod de jure potest.* The personal power of the king does not exceed that of the subject. Thus Year Book 39, Hen. VI., 17, holds, "If the king commandeth one to arrest another, and the

* 7 State Trials, 148. † *Ib.* 157.

‡ Sir Benj. Rudyard, 7 State Trials, 190.

party commanded arrest the other, an action of trespass or false imprisonment is maintainable against the party that arrested him although it were done in the presence of the king."

The arrest by privy councillors, well known to the English constitution, which is an exercise of the royal prerogative, and is done by them as a mouthpiece of the king,* is an exercise of a judicial prerogative of the crown. The learning and history on this subject, and the derivation of these judicial functions to the privy councillors and ministers of the crown, from the king as chief conservator of the peace, was fully gone into by Lord Camden in the case of Entick *v.* Carrington, which was twice argued before him, and is reported in the App. to 11 St. Trials, p. 313. The right to arrest for libel, which was denied to a secretary of state, was denied to him as a judicial function. It is held that where by the law, power to issue a warrant is given to the high conservators, who are not strictly judicial, (as privy councillors,) it is as a branch of the king's judicial prerogative; he being the head of the judicial as of all other power.

The idea of Executive prerogative has surely no existence in the American Constitution. The idea that the Executive is the head of the judicial department of the Government, is in direct contradiction to the anxious theory of every American constitution, State as well as Federal. Where, without one or other of these sources of derivation, can we get the authority, Habeas Corpus or no Habeas Corpus, for imprisonment by the executive department of the Government without the intermediary process of judicial commitment? Yet we have seen it exercised by secretaries of the Executive, having no possible judicial function under the American Constitution.

An effort by the English executive of the present day to raise his civil head in any governmental emergency above the law, or to claim for an hour or in any event a power derived from necessity to which he could show no clear title, and which he undertook to exercise without the authorization of the popular branch of the government, would be to the last degree revolutionary and self-destructive. A military claim to the exercise of such power, without the intervention of the popular department, would not be at all less extraordinary. Such claim has never been made there in their worst days; when the executive claimed to supersede the legislative power, it was as the head of the civil not of the military power of the government.

The strict subordination of the military to the civil power, in and out of governmental emergency, is at the foundation of freedom in that as it

* Staundf. 726.

is in this, and must be in all countries. On this subject De Lolme says: "All offences committed by persons of the military profession, in regard to individuals belonging to other classes of the people, are to be determined upon by the civil judge. Any use they make of their force, unless expressly authorized and directed by the civil magistrate, let the occasion be what it may, makes them liable to be convicted of murder for any life that may be lost. To allege the duties or customs of their profession in extenuation of any offence, is a plea which the judge will not so much as understand. Whenever claimed by the civil power, they must be delivered up immediately." Book 2, chap. 17. Cases need not be quoted to sustain this as the English law. The question has been very seriously made, as in Sutton *v.* Johnstone,* whether, the military adjudication within its jurisdiction, was not subject to civil review; but no question has been made of the exclusion of the military power from exercise over any person who has not put himself out of the pale of the civil power. In the case of Lieutenant Frye, who brought suit against Admiral Mayne and Captain Rentoue, for improperly subjecting him to the penalties of military law, the members of the court martial complained to the Lords of the Admiralty of the legal proceeding; and the result of an altercation of some months was an apology to the power of the law. Chief Justice Willes, having read it in open court, ordered its registry in the remembrance office, as a "memorial to the present and future ages, that whoever set themselves above the law will, in the end, find themselves mistaken."

In Mostyn *v.* Fabrigas, which was an action of trespass against the Governor of Minorca, for false imprisonment, the objection that his official position protected him from the action was rejected by Lord Mansfield, who says: "I remember early in my time, being counsel in an action brought by a carpenter in a train of artillery, against Governor Sabine, who was Governor of Gibraltar, and who had barely confirmed the sentence of a court martial by which the plaintiff had been tried and sentenced to be whipped. The governor was very ably defended, but nobody ever thought that the action would not lie; and it being proved at the trial that the tradesman who followed the train was not liable to martial law, the court were of that opinion; and the jury accordingly found the defendant guilty of the trespass, as having had a share in the sentence, and gave £500 damages."

In the case of Mitchell *v.* Harmony,† Colonel Mitchell, who served under General Kearney in a military expedition into New Mexico during

* 1 Term Reps. 493. † 13 Howard, 115.

the Mexican war, was held liable to the action of a trading camp follower, for the destruction and taking away of his property in the legitimate course of military proceedings. Chief Justice Taney, speaking of the doctrines of Lord Mansfield in Mostyn *v.* Fabrigas, says: "This case shows how carefully the rights of private property are guarded by the laws of England, and they are certainly not less valued nor less securely guarded under the Constitution and laws of the United States."

The Petition of right put an end in England to all question of the power of the Executive to declare the military superior to the civil arm of the Government, in any emergency. Martial law, which is the expression of that idea, and which had been freely used by the Executive power, is by the Petition of right condemned as an illegal violence, not to be used again. The whole governmental power in England has never since attempted the exertion of such authority: we mean the subjection of all the powers of government to the executive will; or the establishment by law of such dictatorial power as is claimed to be conferred by the Constitution on the President to set aside all law. It may be said that the Parliament is omnipotent under their Constitution, and could, therefore, exercise such authority. Such exercise of power would certainly be as revolutionary, and as much an overthrow of their form of government, as to make the tenure of the crown for life or a term of years. The Parliament of Great Britain has frequently suspended the privilege of the writ of Habeas Corpus. This, we have endeavored to show, is the exclusion of the citizen from the benefit of a civil function of the Government; but no more bringing him under military or executive rule, than does the exclusion from trial by jury in a chancery proceeding, take the property of the citizen in such proceeding out of all judicial pale and protection. The idea that the Constitution of the United States, has for a moment, or in any emergency, subjected the power and majesty of the law to the military power, as existing somewhere by necessary ideas of Government, or as derived to the executive from general or specific clauses in the paper, is as answerable and as unanswerable under the English as under the American Government. It is the idea of organized violence as opposed to the idea of organized free government, or organized government more or less free.

The suspension of the writ of Habeas Corpus, as an incident of martial law; or as a lawful exercise of military power, derived to the President as Commander-in-Chief, which involve the same idea, is a subject, so to speak, beyond discussion; certainly apart from it. When that comes, God save us. Constitution and law and human reason are alike silent and at an end; power and instinct take their place. It is no longer the

power of the law and the instinct of reason that we look to; but the power of violence and the instinct of self-preservation.

What is this Martial Law, so much now upon men's tongues? We answer, there is no such law; there is no such provided thing. The law military is a well understood existence, governing with regular provisions the men who belong to it, and the territory within which it is supreme. The time when, under an organized government, this military law is supreme over the civil law, is never. What is called martial law is a cessation of law; when from military necessity, within reach of the military arm, and for a short and undefined time, the constitution and laws, that is with us the Government, is disobeyed and disregarded. This condition of things is abnormal; it is inconsistent with the existence of free government; it is the spasm of the body politic. It is necessarily undefined, and its continuance must be short, or the governmental life is at end.* No organized government has provided for martial law, any

* The practical operation of what is called Martial Law, may be illustrated by an extract which we make from the final report lately made by the commission on war claims at St. Louis. Ex. Doc. No. 94:

"Notwithstanding that martial law had been declared, and the freedom of the popular mind had suffered great repression from the presence of the stern power which had thus announced itself, the indignation excited among the mechanics was such that the conduct of the quartermaster, and especially of his architect, was freely spoken of. Among the persons who ventured to speak of the transaction as it occurred was a Mr. Pond, who was interested with his son-in-law, (Mr. Clapp,) in a bid for the roofing made by the latter. When his words were carried to the ears of Quartermaster McKinstry—then Provost Marshal—he sent a summons ordering him to appear before him; and upon his doing so, and admitting that he had derived his information from Clapp, a file of soldiers was ordered to arrest the latter, and to conduct him into Provost Marshal McKinstry's presence. What occurred then and immediately before we present in the language of Mr. Pond, who was present as one of the accused, and gave his testimony before us under oath.

"'*Charles H. Pond, sworn:*—I got a letter purporting to come from McKinstry's office, to come to his office. This was the middle of the afternoon. I did not go that afternoon, and when I got home my wife told me that a gentleman had been there, and ordered me to appear before McKinstry at his house that night at seven o'clock. I went there precisely at seven, and the serving girl told me that McKinstry had been gone a half an hour, and would not be in before eleven. The next morning I found him in the street, and he told me to come to his office; that he did not do business out in the street. I went to his office, and handed him the little summons he sent me. He said, 'Yes, you have been reporting about this city that I or my agents have been swindling the government.' I told him that Mr. Clapp, my son-in-law, came to me, and wanted to know if I would take a contract with him for putting on the roofing on Benton barracks; that I told Clapp

more than it would provide for its own governmental dissolution. This is especially true of a free government; where anything like constitu-

that I would, if everything was all right; that Clapp said he would give me one-third of the profits, provided I would take hold with him; that there was nothing more said at that time between Clapp and me; that the next day Clapp met me, and said, 'I think I shall get that contract,' and I asked him why. Says he, 'I have given Mr. Ogden, Mr. McKinstry's agent, a draft in favor of P. L. Bierce for $700.' Then I told Clapp that I did not want to have anything to do with it, if that was the case. McKinstry says, 'Did Clapp tell you that?" I said, 'Yes, sir.' 'Well, you shall prove it, or, by God, I will send you down to the arsenal or Cairo, [I can't say which,] and put you on bread and water.' I said, 'Send for Clapp;' and he spoke to Selover or some other person present: 'Have him arrested and brought in here forthwith.' They went out with an armed posse, and brought Clapp in in a few minutes. Says I, 'Mr. Clapp, did you not tell me that you agreed to give Ogden $700 to get this contract for you?' Says McKinstry, 'Stop! by God, I am lawyer enough to ask that question.' Says McKinstry to Clapp, 'Did you give Ogden $500 or $1?' Mr. Clapp said, 'No.' Then says McKinstry, 'I sentence you to the arsenal for five days on bread and water.' Says Clapp, 'Won't you let me explain?' 'No,' says McKinstry, 'you have got your sentence, or you may take such an oath as I will write,' or words amounting thereto. Says Clapp, 'I gave the draft to Ogden, and that Ogden wrote it, and he copied it.' McKinstry said again, 'You have got your sentence.' I then begged McKinstry to send for Bierce, and he did send for him, but got right up immediately out of his chair and said, 'The court is adjourned.'"

"'During the conversation, while Clapp was there, McKinstry got right up and passed by me, and says: 'By Christ! I am going to stop the people of this city from talking about this quartermaster department's swindling.' McKinstry asked me, during the conversation, 'if I had reported what Clapp told me.' 'I told him that I had told it to Bay.' Thomson, the man who had got the contract for putting on the roofing, came up, and he whispered or spoke so low to McKinstry that I could not hear him. McKinstry got up and says to me, 'I understand one more thing, that Clapp refused to take the oath, and I sentence him to five days more at the arsenal on bread and water.'"

"Robert Campbell and John Howe, two merchants of this city, were there.

"Every word and act of the Provost Marshal and Quartermaster McKinstry, throughout this interview, reeks with proofs of conscious and overwhelming guilt. The scene seems scarcely American. It suggests a barbaric age and Asiatic institutions. No Cadi of an eastern sultan, with the bastinado at his beck, could have been more coarsely insulting or more brutally despotic. With the ill-defined and then practically almost absolute powers of the provost marshal to silence criticism upon his administration as quartermaster, it may be safely inferred that after this storm of passion and profanity, McKinstry, for a time at least, had rest, and that the paths of his middle men, like his own, were paths of 'pleasantness and peace.'

"As was to have been expected, the contract, thus fraudulently awarded, was faithlessly executed."

tional provision for, or legal anticipation of such event, would interfere with the subsequent legal accountability, to which the actors in such political convulsion must be held. In that trial at the bar of organized government, the only plea is necessity; the only justification is to show, that to ward off the blow that was aimed at the governmental life, this use of the military arm alone was adequate.*

We say, martial law is not only unprovided for in the Federal Constitution, but that it is the idea hostile to all law, and incapable of legal expression.

Sir Mathew Hale† speaks thus of it: "But touching the business of martial law, these things are to be observed, viz:

"First. That in truth and reality it is not a law, but something indulged rather than allowed as a law: the necessity of government, order, and discipline in the army, is that only which can give those laws a countenance, *quod enim necessitas cogit defendi.*

"Secondly. This indulged law was only to extend to members of the army, or to those of the opposite army; and never was so much indulged as intended to be executed or exercised upon others; for others who were not listed under the army, had no color or reason to be bound by military constitutions, applicable only to the army, whereof they were not parts; but they were to be ordered and governed according to the laws to which they were subject, though it were a time of war."

Sir William Blackstone seems to go further, and doubt the exclusive applicability of the law military, to even its own department, in time of peace. He says,‡ "For martial law which is built upon no settled principles, but is entirely arbitrary in its decisions, is as Sir Matthew Hale observes in truth and reality no law, but something indulged rather than allowed as law. The necessity of order and discipline in an army is the only thing which can give it countenance; and therefore it ought not to be permitted in time of peace, when the king's courts are open to all persons to receive justice according to the laws of the land."

* As to this plea of necessity, Chief Justice Taney, in a question of military seizure of property, not liberty, says: (Mitchell *v.* Harmony, 13 Howard, 427,) "But we are clearly of opinion that in all these cases the danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. It is impossible to define the particular circumstances of danger or necessity, in which this power may be lawfully exercised. Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified."

* Hist. of the Common Law, p. 34. † 1 Comms. 413.

It cannot be fairly contended that the framers of the American Government intended in any respect to abridge or diminish the established principles, supposed to lie at the basis of all popular liberty. These general attributions of unlimited military power to the Federal executive, are difficult to answer, except by principles and generally, as they are asserted. They are like the doctrines of the higher law, not founded on reason, but a refuge and escape from it. They are inconsistent with organized government, and all the principles of organized governments repudiate them. We have in questions concerning the Federal government the well established doctrine, conceded in broad terms by the Attorney-General, that it is above others a government of limited powers; but what avails such concession, if we are afterwards told that from the oath of the executive to support the Constitution are to be implied to him unlimited and discretionary powers. We have, in America, the strongest written guaranties of freedom, confirmed by our inheritance, giving us the benefit of English constitutional law and its provisions; and further strengthened by clauses in many of the State constitutions forbidding to any or all the branches of government to suspend the laws in any emergency. What are all these worth, if it is answer enough to tell us, as does Professor Parker, that war supersedes them all. If we are asked whether the executive may destroy the freedom of speech or of the press, we refer to the general principles of the government; and we turn to the clause of the Constitution which says that "Congress shall make no law abridging the freedom of speech or of the press." The executive power is not limited in this clause, and if, as one of our authors tells us, the idea that the Federal government is one of limited powers applies only to the legislative and judicial departments, and not to the executive, why then undoubtedly the question is unanswered.

In this question of military executive power, if such can seriously be made, we have, as in the Habeas Corpus question, the abundant guidance of our own immediate ancestral lights. Not such lights as are just discovered or discoverable in the year 1861, when our country has enjoyed for half a century the slothful blessings of peace, and is just embarking in one of those periods of physical calamity, which seem, in the providence of God, to be necessary to the preservation or purification of poor human government; but such lights as were given by our forefathers, during, or just emerged from such a bloody strife; and were built upon like free principles so consecrated by their ancestral blood.

On the 7th November, 1775, Lord Dunmore, Governor of Virginia, declared martial law to be enforced throughout the colony. He also declared freedom to all slaves capable of bearing arms, and belonging to

rebels. The Virginia Convention, on December 13th, resolved it "to be in direct violation of the Constitution and laws of this country to declare martial law in force, and to be executed throughout this colony, whereby our lives, our liberty and property are arbitrarily subjected to his power and discretion," &c.*

The Maryland Declaration of Rights, November, 1776, contains clauses, "That in all cases and at all times the military ought to be under strict subordination to and control of the civil power." Art. 27. "That no person, except regular soldiers, mariners and marines in the service of this State or militia, when in actual service, ought in any case to be subject to or punishable by martial law." Art. 29.

One of the complaints of the Declaration of Independence against the executive power is, "He has affected to render the military superior to the civil power."

"That the military is, and in all cases and at all times shall be in strict subordination to the civil power," is a provision, in those or words of like import, to be found in almost all of the American State Constitutions.

"Consider yourself in all your military offensive operations constantly as under the direction of the civil officer, saving where an armed force shall appear and oppose your marching to execute these orders," say Governor Bowdoin's instructions to Major General Lincoln, January 19th, 1787, Shay's insurrection.

In the case of ——— Lamb, brought up on Habeas Corpus on petition to be discharged from military arrest,† Judge Bay speaks thus upon this subject, "If by martial law is understood that dreadful system the *law of arms* which in former times was exercised by the King of England and his lieutenants when *his word was the law*, and his *will the power*, by which it was *exercised*, I have no hesitation in saying that such a monster could not exist in this land of liberty and freedom. The political atmosphere would destroy it in embryo. It was against such a tyrannical monster that we triumphed in our revolutionary conflict. Our fathers sealed the conquest by their blood, and their posterity will never permit it to tarnish our soil by its unhallowed feet, or harrow up the feelings of our gallant sons by its ghastly appearance. All our civil institutions forbid it; and the manly hearts of our countrymen are steeled against it. But if by the military code is to be understood the rules and regulations for the government of our men in arms, when marshalled in defence of our country's rights and honor, then I am bound to say there is nothing unconstitutional in such a system."

* 4 Am. Archives, 4th series, p. 778–81. † 1 Carolina Law Repository.

Before this exercise of his military authority at New Orleans, General Jackson took the opinion of Mr. Livingston on this subject, which was as follows: "Martial law can only be justified by the necessity of the case. The General proclaims it at his risk and under his responsibility, not only to government but to individuals; because it is a measure unknown to the Constitution and laws of the United States. The effect of its proclamation is to bring all persons in the district comprised by it within the purview of such law, so that all those in that district capable of defending the country, are subject to such law by virtue of the proclamation, and may be tried by it during its continuance."

In Johnson *v.* Duncan, 3 Martin, 157, the question of the right by proclamation of martial law, to suspend and supersede the functions of the civil magistrate, is considered. The idea that the suspension of the Habeas Corpus suspends all functions of the civil magistrate, and introduces martial law, is rejected as a bold and novel assertion; as well as the idea that any but the legislative power can suspend the Habeas Corpus.

On the 30th June, 1813, during the war with Great Britain, Samuel Stacy, a citizen residing in St. Lawrence, a border county, was arrested by the order of Commodore Chauncey, and carried to Sackett's Harbor. He was charged with treasonable practices, in carrying provisions, and giving information to the enemy; he was claimed to be properly held by the Provost Martial, and to be triable by Court Martial. A writ of Habeas Corpus which was directed to General Lewis, showed by its return only a disclaimer of the custody of the prisoner. It appeared, from affidavits and circumstances in the case, that this was only an evasive return. Chief Justice Kent, who delivered the opinion of the Court, made no question of the duty of the law; except whether an attachment for contempt should issue forthwith against the General, or there should be first a rule to show cause why an attachment should not issue. He decided the former to be the duty of the Court; and an attachment forthwith was ordered. He says, "The pretended charge of treason, (for upon the facts before us we must consider it as a pretext,) without being founded upon oath, and without any specification of the matter of which it might consist, and without any color of authority in any military tribunal to try a citizen for that crime, is only aggravation of the oppression of the confinement. It is the indispensable duty of this Court and one to which every inferior consideration must be sacrificed, to act as a faithful guardian of the personal liberty of the citizen, and to give ready and effectual aid to the means provided by law for its security. One of the most valuable of those means is this writ of Habeas

Corpus, which has justly been deemed the glory of the English law; and the Parliament of England, as well as their Courts of Justice have on several occasions, and for the period of at least the two last centuries, shown the utmost solicitude, not only that the writ, when called for, should be issued without delay, but that it should be punctually obeyed. Nor can we hesitate, in promptly enforcing a due return to the writ, when we recollect, that in this country the law knows no superior; and that in England their courts have taught us by a series of instructive examples to exact the strictest obedience, to whatever extent the persons to whom the writ is directed, may be clothed with power, or exalted in rank. . . . . If ever a case called for the most prompt interposition of the Court to enforce obedience to its process, this is one. A military commander is here assuming criminal jurisdiction over a private citizen; is holding him in the closest confinement, contemning the civil authority of the State."

To this conclusive judicial decision against the argument he is making, that "distinction exists in respect to the duty of obedience to the writ of Habeas Corpus, in time of war and in time of peace," Professor Parker, acknowledging "the high character of the judicial tribunal which passed upon Stacy's case," tells us nevertheless as sufficient answer to the decision, "that the attention of the Court does not seem to have been directed for an instant to the question, whether the existence of the war at that time could have any effect upon the right of the military force to make the arrest, or of the commander to hold the party arrested." We can only say, that if this is the learning of the schools, it is not the practice of courts of law; if it were so, our constitutional decisions would be terribly unsettled by some of the views, now propounded to us; which, like the view suggested, that the limited nature of the powers of the Federal government is true of the legislative and judicial but not of the executive department, are original, beyond a question.

Every case which has arisen of Habeas Corpus to try the validity of a military enlistment, is a similar assertion of the superiority of the civil over the military side of the government. These cases are familiar in every jurisdiction, where there has been a recruiting station, and as familiar in time of war as in time of peace.

Necessity knows no law; and that is the rule by which a military commander declares what is called martial law. It is the same rule by which a citizen takes the life of a fellow citizen, who has burglariously entered his house, and is apparently meditating an assault upon his life. It is a sort of law unprovided by statute, which constitutions do not deal with; which is to be found neither on the civil, nor on the military

side of any presidential power; nor of any legal or constitutional provision. The exercise of this power, the President as commander in chief may find when he takes the field, an incident to circumstances upon which he may fall, as may any inferior commander. In the Cabinet he has no such power; nor is it a thing that can be delegated.

As "necessity knows no law," so "law knows no State necessity." Lord Camden speaks thus of it: "With respect to the argument of State necessity, or a distinction that has been aimed at, between state offences and others, the common law does not understand that kind of reasoning, nor do our books take notice of any such distinctions."*

If State necessity could be pleaded, as it cannot, what State necessity could be shown for the indignities and violences which have been put upon the law and which American lawyers are defending. Alas that the legal hands which should minister at the altar of the Constitution, should subserve to desecrate that altar. As the Chief Justice has well shown, was the power of the law inefficient or insufficient in Baltimore, when Mr. John Merryman was seized by the military arm for a civil offence against the Government? Was the process of the law paralyzed in Philadelphia, when Mr. Butler was taken from his home under a secretary's order, to be imprisoned in a distant fortress? Was the process of the law paralyzed in Burlington, when Mr. Wall was so arrested and dragged to a distant prison? On the contrary, so poisoned and so violent was public opinion, that the process of the law would have had but one difficulty; that of doing justice to either of these two latter parties. The Government, instead of affording to these citizens their rights, catered to the disgraceful appetite of the hour, and violated the law that that appetite might be gratified.

The military outrages upon the elective franchise in Maryland, the trial of newspaper publications by a military commission in Missouri, the military assault upon Judge Merrick, we will not stop to comment on; but these others are the acts of civil power, which great American legal names seem anxious to sacrifice themselves in vain effort to defend. When Bonaparte planned the 18th Brumaire for the overthrow of French constitutional liberty, because he thought the "public safety" required it, he said to General Lefebvre, who hesitated about joining him, come let us get rid of the government of these *lawyers*. No doubt they stood in his way. Those were the lawyers of France after she had supped full with horrors, and who felt the value of constitutional liberty; the growth was nerved to vigor by peril, and had not become sicklied o'er with the pale cast of peace, as in our day.

* Entick *v.* Carrington, App. 11 State Trials, 322.

The future alone can develop what may be in store for us; our country is too full of the vigorous intelligence which free institutions have given our people, to submit to an 18th Brumaire. We have, moreover, the States to protect us from that. There is nothing national on the one side or the other of the ruinous conflict into which the want of statesmanship has plunged us. This fatal subordination of government to partizan politics, is the canker of a calm world and a long peace; the canker of such physical prosperity and increase of wealth, as no people have ever before realized in the same space of years. Pennsylvania will be, like the other border States, the first to find the false and ruinous position into which sectional madness, not her own, has misled her. The national statesmanship of those in power, inscribes on the regimental colors symbols commemorative of their having been carried gallantly in these calamitous fraternal conflicts; the recollection of which must be buried deep in woe and oblivion, before our American national sun can shine again. When Cæcina Severus, to flatter the emperor, proposed in the Roman Senate the erecting an altar to Vengeance to commemorate the death of Piso, Tiberius, who for twenty three years governed a nation, replied that public monuments should commemorate foreign conquests not domestic calamities, "*ob externas ea victorias sacrari, domestica mala tristitia operienda.*"

The division of our country, the only result which our friends across the water seem to contemplate, is impossible. Fortunately, no view of the problem is so difficult as that. We are realizing the irrepressible conflict. When the appetite for peace returns, as it will with violence, woe betide the rulers and the rule that may have committed themselves to its impossibility, or that may stand in the way if its realization. When the bitter strife has exhausted itself; when the irrepressible conflict has been repressed, and with it the miscreants whose only political existence is built upon the feuds and hatreds which could be found and fostered in American institutions, have met their fate, America will return to the Union which is associated with her every glory and which made her the envy and marvel of mankind. The Union is peace. The former as impossible of attainment but through the latter, as the latter is impossible of enjoyment without the former. In the meantime to stand by our American institutions, and the Federal Constitution, as exhibited and upheld by them, is a clear duty. The violences put upon it, the writhings and contortions of legal arguments to escape from it, all do it honor. They all show the impossibility of turning to the purposes of sectional strife and party violence this great instrument, which during seventy years ministered to the Government of a great and successful nation, and will assuredly in the providence of God resume its work.